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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAVID J. LEE, an individual and on behalf of others similarly situated,

Plaintiff,

v.

CAPITAL ONE BANK and CAPITAL ONE SERVICES, INC., Virginia corporations, DOES 1 through 100, inclusive,

Defendants.

Case No. C07-4599 MHP

CLASS ACTION

DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS

Date: March 3, 2008
Time: 2:00 p.m.
Place: Courtroom 15
Hon. Marilyn Hall Patel

Complaint filed: Sept. 5, 2007

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INTRODUCTION

At the December 10, 2007 case management conference, the Court expressed concern that the limited resources of the federal judiciary were being diverted from serious issues to this obviously contrived lawsuit. Indeed, the Court explicitly warned plaintiff that it was "going to look at Rule 11 seriously," and advised him to "proceed at [his] own peril." Rather than heeding the Court's warning, plaintiff offers arguments in response to defendants' motion that are as contrived as his pleading.

In response to the argument that he lacks standing, plaintiff offers the following theory of "injury": He applied for and received a Capital One Bank credit card that required him to pay an annual fee of $39. He believed the credit card agreement contained an enforceable arbitration provision, to which he unilaterally assigns a pecuniary value of some unknown fraction of his annual fee. He thereafter "learned" that, in his lawyer's opinion, the arbitration provision is not enforceable and now claims that he has "'lost' some or all of the value/consideration paid by him for his vested contractual right to mandatory arbitration." (Opp. at 2-3.)

Plaintiff's standing theory fails in virtually every respect. "Annual" or "membership" fees are not paid to obtain a bundle of contractual rights to which some pro rata share of the fee is attributed. To the contrary, and as a matter of federal law, such fees are paid for the right to participate in a credit plan. Moreover, open-end credit plans, such as the one at issue here, are always subject to change as a matter of law and usually as a matter of contract. This would not be possible if the payment of an annual or membership fee vested a credit-card holder with some type of "ownership" interest in the terms of the parties' contract.

That issue aside, the parties do not have any real or ripe substantive "dispute." No one has attempted to invoke the arbitration clause, so there is no Article III basis for this Court to exercise jurisdiction to determine its enforceability. Plaintiff's abstract belief that the clause is unconscionable is not sufficient to permit him to maintain this suit. The supposed "sea change" in the law to which plaintiff adverts (Opp. at 7-8) does not impact this analysis and, in fact, confirms it. In ***every case*** plaintiff cites there was a genuine dispute between the parties and an attempt to invoke arbitration. In short, there is an established time and process—blessed by

Congress in the Federal Arbitration Act—for courts to assess arbitration clauses. There is no need, or legal basis, for courts to "step up" and identify "previously judicially unrecognized injuries as sufficient to maintain a lawsuit in the federal courts." (Opp. at 8.)

This is exactly what Judge Breyer concluded, correctly, defendants submit, in *American Express*. But even assuming that Judge Breyer's decision were "erroneous," "uninformed," and "insupportable," plaintiff here is bound by it. While plaintiff correctly notes that this Court must afford Judge Breyer's decision the collateral estoppel effect a California court would, he misapplies the rule—California courts afford finality to federal judgments even when they are on appeal.

Further, plaintiff's claims also fail for other reasons. Plaintiff has not stated a UCL claim under California law because he did not allege "lost money or property." His CLRA claims fails because the CLRA does not apply to the extension of credit or the credit card agreements at issue here. And his fraud claim fails because it is not adequately pled.

Plaintiff cannot cure the substantial defects in his Complaint. Defendants thus request that the Court grant the motion to dismiss in its entirety, without leave to amend.

ARGUMENT

I. COLLATERAL ESTOPPEL BARS THE COMPLAINT.

In their opening brief, defendants argued that the doctrine of collateral estoppel bars plaintiff's complaint. Specifically, Judge Breyer determined that plaintiff lacked Article III standing to mount these types of abstract challenges to arbitration clauses. *See Lee v. Am. Express Travel Related Servs.*, No. C 07-04765 CRB, 2007 WL 4287557, at *5 (N.D. Cal. Dec. 6, 2007). Of the three elements of collateral estoppel, plaintiff does not contest that there is an identity of issues and, on the plaintiff's side, parties. Instead, his sole challenge to defendants' argument is that *American Express* is not final because he has filed a notice of appeal.[1]

[1] The Notice of Appeal was filed on December 31, 2007, after defendants filed their opening brief in this case.

Plaintiff's analysis is flawed. As plaintiff notes, a federal court sitting in diversity applies the preclusion law that the forum state would apply. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001). Thus, the question is what preclusive effect a California court would grant to a federal district court judgment on which an appeal is pending. *See Giles v. GMAC*, 494 F.3d 865, 884 (9th Cir. 2007) (examining the preclusive effect given by Nevada courts to federal district court decisions).

California courts hold that a "federal judgment has the same effect in the courts of this state as it would have in federal court." *Younger v. Jensen*, 26 Cal. 3d 397, 411 (Cal. 1980) (citation omitted); *see also Burdette v. Carrier Corp.*, 158 Cal. App. 4th 1668 (2008) (where a federal district court sitting in diversity had entered judgment, California Court of Appeal looked to federal law to determine whether the judgment was "final"). The federal rule is that "a pending appeal does not affect a judgment's finality for preclusion purposes." *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007) (citing *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988)).

Accordingly, California courts found that federal court judgments have preclusive effect when appeals are pending as to those judgments. *See Lumpkin v. Jordan*, 57 Cal. Rptr. 2d 303, 307 (Ct. App. 1996) ("[F]or collateral estoppel purposes, the federal court's ruling on the summary judgment, even though appealed, must be considered final"); *Younger*, 26 Cal. 3d at 411 ("[T]he fact that the Attorney General has appealed from the ARCO judgment does not prevent it from operating as a collateral estoppel"); *Calhoun v. Franchise Tax Bd.*, 20 Cal. 3d 881, 887 (Cal. 1978) ("We note that an appeal from the federal judgment is now pending in the Ninth Circuit Court of Appeals. The federal rule is that 'a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition.' A federal judgment is as final in California courts as it would be in federal courts . . . ." (citations omitted)).

Plaintiff's case law is not to the contrary. Plaintiff cites California cases evaluating the preclusive effect of state court rulings or state administrative decisions, not federal court decisions. *See Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th

1168 (2000) (evaluating preclusive effect of state court judgment); *Abelson v. Nat'l Fire Ins. Co*., 28 Cal. App. 4th 776, 787 (1994) (same); *Long Beach Unified Sch. Dist. v. California,* 225 Cal. App. 3d 155, 169 (1990) (evaluating preclusive effect of state administrative board decisions); *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007) (evaluating preclusive effect of state court judgment); *Dunn v. Noe*, No. C-07-3559 JCS, 2007 U.S. Dist. LEXIS 86521, at *21-22 (N.D. Cal. Nov. 7, 2007) (same); *Nat'l Fire Ins. Co v. Stites Prof'l Law Corp*., 235 Cal. App. 3d 1718, 1726 (1991) (preclusive effect of arbitration proceeding).

Plaintiff's lone challenge to the application of collateral estoppel is fatally flawed. Judge Breyer's decision in *American Express* collaterally estops him from re-litigating here the issue of his Article III standing.

II. PLAINTIFF HAS NOT ESTABLISHED ARTICLE III STANDING.

Even if the Court considers the issue anew, plaintiff has not borne his burden of establishing standing. "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiff does not, and cannot, meet Article III's standing requirements.

A. Plaintiff's Theory of "Injury" Fails As A Matter Of Law.

Plaintiff claims that he has suffered Article III injury because he got less than he paid for with his $39 annual fee—he paid for an enforceable arbitration agreement, but allegedly got an unenforceable one. In plaintiff's own words, "his annual fee was paid, at least in part, as monetary consideration for the contractual right to mandatory arbitration."

Plaintiff's theory that he paid for something that he did not get is simply wrong. The credit relationship at issue here is governed by the federal Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* and Regulation Z, 12 C.F.R. Part 226. Under Regulation Z, annual membership or "participation" fees are charged as a condition for access to or participation in a

particular type of credit plan. As the Federal Reserve Board notes in its Official Staff Commentary explaining the requirement that such fees be disclosed:

> the provision [requiring disclosure, 12 C.F.R. §226.4(c)(4)] applies to any credit plan ***in which payment of a fee is a condition of access to the plan itself***, but it does not apply to fees imposed separately on individual closed-end transactions. The fee may be charged on a monthly, annual, or other periodic basis; a one-time, non-recurring fee imposed at the time an account is opened is not a fee that is charged on a periodic basis, and may not be treated as a participation fee.

Truth in Lending: Official Staff Commentary, 12 C.F.R. § 226.4, Supp. I, cmt. 4(c)(4), p. 386 (2007) (emphasis added).[2] Membership fees are not paid to acquire a bundle of contractual rights in a credit card agreement—e.g., "$1.50 for a choice-of-law clause, $2.75 for a provision requiring an average daily balance finance charge calculation"—but instead as a condition of participation.

Other provisions of federal law applicable to open-end credit plans confirm this. Federal law expressly authorizes creditors under open-end credit plans to change the terms of the plans. Indeed, the proposition is so well established in federal law that the only question there is whether a creditor does or does not need to give advance notice of the change. *See* 12 C.F.R. § 226.9(c)(1)-(2); *see also* Truth in Lending: Official Staff Commentary, 12 C.F.R. § 226.9, Supp. I, cmt. 9(c), p. 423 (2007); *Schnall v. Marine Midland Bank*, 225 F.3d 263 (2d Cir. 2000). Moreover, the customer agreement plaintiff attaches to his complaint specifically reserves to Capital One Bank the right to change terms. (Compl. Ex. 8.) If plaintiff's theory were correct—that membership fees were paid in exchange for specific immutable contractual rights—then these provisions of federal law and the contractual term would be meaningless.

[2] The Federal Reserve Board's Regulations and Commentary, which are based on the assumption that a change in terms is permitted, have the force and effect of law, and must be afforded deference unless "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-70 (1980).

B. Plaintiff Has Not Otherwise Demonstrated Injury In Fact.

Plaintiff's entire complaint rests on the theory that the contract between him and Capital One Bank contains an allegedly "unlawful" or "unconscionable" provision—a provision that his Complaint concedes was disclosed when he applied for the card. (Compl. ¶ 42.) But it is well established that a party to a contract cannot file a lawsuit simply because it believes that a contract provision that has not even been exercised (and may not ever be exercised) is invalid. *Cal. Energy Res. Conservation & Dev. Comm'n v. Johnson*, 807 F.2d 1456 (9th Cir. 1987) (the provision at issue "has never been implemented…[r]ather, CEC challenges a contract provision, entirely dormant to date, that seems to set limits within which rates will perhaps someday be established…A decision at this juncture would resolve a dispute about hypothetical rates. 'Courts have no business adjudicating the legality of non-events.'") (citing *Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982)); *see also Lee v. Am. Express*, 2007 WL 4287557, at *5 (noting that plaintiffs' only dispute is the existence of allegedly unconscionable terms in the contract; the inclusion of those terms does not, standing alone, constitute an injury in fact).

These decisions are consistent with the structure of the Federal Arbitration Act. The FAA contemplates that challenges to arbitration provisions will be resolved in proceedings to enforce arbitration clauses: The FAA, as the Supreme Court has repeatedly held, establishes a "broad principle of enforceability" of arbitration agreements. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996) (citation omitted). The FAA allows that a party to an agreement to arbitrate "may assert general contract ***defenses*** . . . ***to avoid enforcement of an arbitration agreement***." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (emphasis added). Here, plaintiff does not allege that Capital One Bank has sought to enforce its arbitration agreement with him. He seeks to affirmatively challenge the arbitration agreement on its face.

Thus, plaintiff's claim is plainly based on a hypothetical injury. He is assuming that *if* he attempted to arbitrate a dispute, the arbitrator would find that the arbitration provision is unconscionable and plaintiff would ultimately be forced to litigate his case in a court, losing his contractual right to arbitrate. His purported injury is thus based on a series of assumptions and is neither concrete nor imminent. *Lujan*, 504 U.S. at 564 n.2. ("Although 'imminence' is

concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'") (emphasis in original).

As cited in defendants' opening brief, because defendants have made no attempt to invoke the arbitration agreement with respect to plaintiff's claims, plaintiff's complaint fails. *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1334 (11th Cir. 2000) ("[P]laintiffs lack standing . . . because there has been no attempt to enforce the agreement against them, and they have not established that there is a substantial likelihood that it will be enforced against them in the future."); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984) (lack of standing where plaintiff "did not allege or establish that it had been injured by actual arbitration under the statute"); *Posern v. Prudential Sec., Inc.*, No. C-03-0507 SC, 2004 WL 771399, at *8 (N.D. Cal. Feb. 18, 2004) (motion to dismiss for lack of standing granted where there was no pending arbitration proceeding and thus no "actual controversy").

Despite filing an oversized brief, plaintiff did not distinguish—or even reference—any of this significant authority, which establishes that plaintiff's complaint fails as a matter of law for lack of standing. Instead, plaintiff cited several cases to support his assertion that the Court identify "previously judicially unrecognized injuries as sufficient to maintain a lawsuit in the federal courts." (Opp. at 8.) Plaintiff relies primarily on *Lozano v. AT&T Wireless Services*, 504 F.3d 718 (9th Cir. 2007), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006). None of these cases supports plaintiff's theory.

C. Plaintiff's Authority Is Inapposite.

Plaintiff argues that *Lozano* stands for the proposition that "a person suffers an injury and has standing when he loses 'money' or 'value' because he does 'not receive the full value of his contract.'" (Opp. at 13.) As Judge Breyer ruled in his Order in the *American Express* case: "*Lorenzo*, however, does not help plaintiffs and, indeed, demonstrates that plaintiffs lack standing." 2007 WL 4287557, at *5.

The plaintiff in *Lozano* was a customer of AT&T who brought a class action in federal court challenging AT&T's practice of billing its cell phone customers for calls during a billing period other than the billing period in which the calls were made. This practice is known as "out-of-cycle" billing. AT&T responded by moving to compel arbitration. *Lozano* opposed the motion, and the court refused to compel arbitration on the ground that the arbitration agreement contained an unconscionable class action waiver. 504 F.3d at 723.

The issue of standing in *Lozano* only arose in connection with the UCL claim. But as the *Lozano* court stated: "The parties do not dispute that Lozano *suffered pecuniary loss* as a result of his alleged unawareness of [AT&T's] out-of-cycle billing practices…*Lozano* received an invoice stating he had been charged fees as a result of out-of-cycle minutes from his previous invoice." *Id.* at 732 (emphasis added). The court also found that Lozano had reserved, and lost, certain "anytime minutes" during each billing period. *Id.* at 733. Accordingly, Lozano suffered an actual injury from AT&T's out-of-cycle billing practice in the form of additional charges and being unable to use all monthly minutes for which the plaintiff had contracted. *Id.* at 731-34. *Lozano* thus does not provide any support for plaintiff's standing argument. Nothing in that case suggests that plaintiff here has alleged the requisite injury in fact to proceed with his litigation against defendants.

In an attempt to show that his dispute is not hypothetical, plaintiff argues that *Buckeye* and *Nagrampa* "conclusively" hold that plaintiff's "claims" are not arbitratable. Plaintiff again misses the point.

In *Nagrampa*, the plaintiff entered into an agreement with MailCoups to operate a direct mail coupon advertising franchise. 469 F.3d at 1265. After two years of unprofitable operation of her franchise, Nagrampa unilaterally terminated the franchise agreement. MailCoups initiated arbitration proceedings by filing a Demand for Arbitration claiming that Nagrampa owed $80,000 in fees. Nagrampa, in turn, asserted that rather than making a 41% profit per year, she incurred $180,000 in personal debt and had to pay over $400,000 in fees to MailCoups. *Id.* Nagrampa objected to arbitrability at the outset of the dispute. The Ninth Circuit acknowledged that unconscionability is a "contract defense" which may render an arbitration provision

unenforceable. *Id.* at 1280. The court held that the arbitrability of the dispute was a threshold issue for the courts; that because the plaintiff challenged only the validity of the arbitration provision, a court (not arbitrator) must decide whether the provision is invalid and unenforceable under the Federal Arbitration Act. *Id.* at 1264.

Buckeye is also irrelevant. In that case, the Court merely reaffirmed the general rule that when a complaint challenges the validity of an agreement containing an arbitration provision, the question whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. *Buckeye*, 546 U.S. 440. The plaintiffs in that case entered into various deferred-payment transactions with Buckeye Check Cashing ("Buckeye"), in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each separate transaction they signed a "Deferred Deposit and Disclosure Agreement" (Agreement), which included arbitration provisions. *Id.* at 442. Plaintiffs brought a class action in Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face. *Id.* at 443. Buckeye moved to compel arbitration. The trial court denied the motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void *ab initio*. *Id.* The matter ultimately got to the Florida Supreme Court, which agreed with the trial court. *Id.* Upon review, the U.S. Supreme Court reversed, holding that because the plaintiffs challenge[d] the Agreement, but not specifically its arbitration provisions, …[t]he challenge should therefore be considered by an arbitrator, not a court." *Id.* at 446.

The present case is entirely distinguishable from *Nagrampa* and *Buckeye*. In fact, standing was not at issue in either of those cases; those cases involved actual disputes between the parties where the plaintiffs had alleged concrete, particularized injuries. The only issue before the courts in *Nagrampa* and *Buckeye* was whether a court or arbitrator would adjudicate the unconscionability contract defense asserted by the plaintiffs. The cases do not, as plaintiff argues, recognize "causes of action identical to the ones brought by [p]laintiff here." (Opp. at 18.)

Further, in contrast to the present case, the disputes in *Nagrampa* and *Buckeye* were ripe for judicial review.[3]

D. Plaintiff Cannot Create Standing Simply By Alleging Violations Of The CLRA And UCL.

Plaintiff's circular argument, that he has standing to proceed despite suffering no injury simply because he has *alleged* that defendants violated the CLRA and UCL, fails. (Opp. at 21-22.) Plaintiff's authority is lacking.[4] *Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal. 3d 582 (Cal. 1984) does not stand for the proposition that a plaintiff can sue under the CLRA without suffering any actual damages. There, the plaintiff brought an action against a bank individually and as a representative of a class, alleging the bank violated the CLRA by falsely representing that customers would not be charged management fees in connection with individual retirement accounts. The plaintiff notified the bank that its alleged violations affected individuals other than herself and she intended to file suit if it did not rectify its violations. Shortly before the plaintiff filed the action, the bank notified the plaintiff it had not deducted the $15 management fee from her account and refunded the fee it had charged her husband. Subsequently, the bank asserted that the action lacked merit because the plaintiff had not suffered any damage as required by Civil Code section 1780. Noting that a prospective defendant should not be able to avert a class action by "picking off" prospective plaintiffs one-by-one, the Supreme Court held the "exemption of the plaintiff from the imposition of the trustee fee does not render her unfit per se to represent the class." *Id*. at 595. Further, reading *Kagan* to permit a party to sue under the CLRA by simply alleging a violation of that act would eviscerate the statutory language requiring that the plaintiff

[3] Plaintiff's additional charge that he could not invoke the arbitration provision here without waiving all challenges to the provision is nonsensical and inconsistent with the law, which plaintiff cited in note 24 of his Opposition brief. (Opp. at 20 n.24 (citing *George Day Constr. Co. v. United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1475 (9th Cir. 1984)).)

[4] Plaintiff cites to *Freeman v. Mattress Gallery*, Nos. E039614, E039615, 2007 WL 3300717 (Cal. Ct. App. 2007) for the proposition that the mere allegation of a violation of the CLRA confers standing. *Freeman*, however, is unpublished and noncitable under California law, *see* Cal. Rules of Court, Rule 8.1115, and therefore is not citable under the rules of this Court, *see* N.D. Cal. Civ. L.R. 3-4(e).

suffer "damage as a result" of a CLRA violation. Cal. Civ. Code § 1780; *see also Wilens v. TD Waterhouse Group, Inc.*, 15 Cal. Rptr. 3d 271, 276 (Ct. App. 2003).

Plaintiff cites no case holding that a party has standing merely by asserting a violation of the UCL. Such a proposition would be wholly inconsistent with the recent amendment to the UCL, which requires a plaintiff to have "lost money or property" as a result of defendants' alleged unfair competition to state a claim. Cal. Bus. & Prof. Code § 17204.

* * *

This case involves nothing more than a hypothetical injury tied to plaintiff's right to arbitrate a dispute, if and when one should arise. Unlike the parties in the cases that he cites, plaintiff has lost nothing. He received exactly what he was promised; indeed, as the complaint acknowledges, the terms and conditions of the account were plainly disclosed to plaintiff in advance of his application. Plaintiff's abstract challenge to the mere presence of an uninvoked term that he purports to find objectionable under California law fails for lack of standing.

III. PLAINTIFF HAS NOT STATED CLAIMS UNDER THE UCL.

Plaintiff's opposition does not counter the points made in defendants' motion regarding plaintiff's invalid UCL claims. As explained in defendants' opening brief, plaintiff has standing to assert his UCL claims only if can establish that he suffered "injury in fact" and "lost money or property" as a result of defendants' alleged unfair competition. Cal. Bus. & Prof. Code § 17204. The term has been interpreted to mean that the "offending party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep." *Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55, 64 (Ct. App. 1998); *see also Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007). None of the allegations in plaintiff's complaint meet this standard.

Plaintiff has not alleged and cannot allege that he has "lost money or property." His claim that he "lost" money as a result of the alleged unconscionability of the arbitration provision is nothing more than conjecture.[5] *Buckland v. Threshold Enters., Ltd.*, 66 Cal. Rptr. 3d 543, 554-55

[5] Plaintiff contends that the Court cannot grant defendants' motion to dismiss because there is no "evidence" presented on the lack of damages suffered by plaintiff. But the Court need

(Footnote continues on next page.)

(Ct. App. 2007) (plaintiffs asserting UCL claim must show a "distinct and palpable injury" that is concrete and is not "conjectural" or "hypothetical"). His alleged "loss" and "injury" is purely hypothetical and abstract because the arbitration provision has never been invoked. Because plaintiff has not alleged any actual pecuniary damages, he lacks standing to assert claims under the UCL.

IV. THE CLRA DOES NOT APPLY TO PLAINTIFF'S CLAIMS.

The CLRA applies only to the sale of "goods or services" to California "consumers." Cal. Civ. Code § 1770. Plaintiff attempts to re-litigate *Berry v. American Express Publishing Co.*, 54 Cal. Rptr. 3d 91 (Ct. App. 2007) by arguing that defendants' extension of credit to plaintiff is a "contract" for "goods or services" subject to the CLRA. (Opp. at 24.)

The same arguments put forth in plaintiff's opposition were made by the plaintiff in *Berry*. In *Berry*, the plaintiff brought an action for violation of the CLRA based on the theory that the agreement contained an "unconscionable" arbitration agreement. The plaintiff in that case argued that his credit card agreement was subject to the CLRA because a credit card is a "good" or "service." The court completely rejected this argument and held that under the language of the statute and the legislative history, the extension of credit is not covered by the CLRA. 54 Cal. Rptr. 3d at 94. *Berry* has been followed by numerous other courts as demonstrated in defendants' opening brief. And as stated by this court in *In re Late Fee & Over-Limit Fee Litigation*, No. C 07-0634 SBA, 2007 U.S. Dist. LEXIS 86408 (N.D. Cal. Nov. 16, 2007), "[e]very federal court addressing the issue has followed [*Berry*.]" *Id.*, at *35.

Plaintiff tries to avoid the clear holding of *Berry* and its progeny by asserting that defendants provide a "convenience service" and thus, the CLRA applies. Other than using the term "convenience service," plaintiff does not explain how such a "service" constitutes anything more than the extension of credit. And plaintiff does not cite any authority (there is none) to

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only consider plaintiff's insufficient allegations to conclude that he has not "lost money or property" as that term has been interpreted under the UCL.

support his claim that a "convenience service" constitutes a "service" under the CLRA. Plaintiff's attempt to rely on *Hitz v. First Interstate Bank*, 38 Cal. App. 4th 274, 286-87 (1995) is a non-starter. *Hitz* is not a CLRA case and is irrelevant to this litigation. *Hitz* predates Berry by more than 10 years and one cannot accept plaintiff's suggestion that a quote in *Hitz* (credit card agreements "encompass[] convenience services in addition to the extension of credit") in any way negates the clear holding in *Berry*. Further, nothing in any subsequent decision or CLRA case suggests that the use of the term "convenience service" in the extension of credit is somehow governed by the CLRA.

Plaintiff's other authority is also readily distinguishable. For instance, the court in *Jefferson v. Chase Home Finance LLC*, No. C06-6510 TEH, 2007 WL 1302984 (N.D. Cal. May 3, 2007) did not hold that the CLRA applies to the extension of credit. The court in that case simply held that the CLRA applied to services obtained in connection with mortgages, in particular, a program that allowed debtors to repay their debt without penalty. The court concluded that given these specific programs, the transactions between the parties involved more than the mere provision of a loan. *Id.*, at *3.

Likewise, *Hernandez v. Hilltop Financial Mortgage, Inc*., No. C 06-7401 SI, 2007 WL 3101250 (N.D. Cal. Oct. 22, 2007) is inapposite. In that case the plaintiffs sought more than the extension of credit or a loan, "they sought defendants' services in developing an acceptable refinancing plan by which they could remain in possession of their home. Thus, unlike in *Berry*, the situation in the present case involves more than the mere extension of a credit line." *Id.*, at *6.

Finally, plaintiff is wrong that the use of the term "convenience service" on a website renders the CLRA applicable here.[6] The extension of credit via a credit card is always issued for the convenience of a consumer. But the mere extension of credit does not involve the "sale or

[6] The Court should deny plaintiff's request for judicial notice of two screenshots that he claims to have taken from Capital One websites (Exs. D and E to Plaintiff's Request for Judicial Notice). Plaintiff argues that the Court must take judicial notice of these documents because they are related to his "convenience service" argument. But these documents do nothing to advance his invalid argument that the use of the term "convenience service" renders the CLRA applicable to the extension of credit, and the Court need not consider these irrelevant materials. *Del Campo v. Kennedy*, 2008 U.S. App. LEXIS 2559 at *10 n.7 (9th Cir. Feb. 6, 2008) (denying request for judicial notice of irrelevant materials).

lease of any specific goods or services." *Id.* "[C]redit cards are not included within the plain language of CLRA." *Berry*, 54 Cal. Rptr. 3d at 97. Semantics cannot save plaintiff's deficient CLRA claims.

Plaintiff restates his argument concerning the *Kagan* and *Freeman* case to support his assertion that "'damage' sufficient to create his CLRA standing is the alleged violation of his statutory right to not have unconscionable terms inserted in his card agreement." (Opp. at 27.) As discussed above, neither of these cases is relevant here.

Moreover, the plain language of the statute requires that a plaintiff suffer "damage as a result" of a CLRA violation. Cal. Civ. Code § 1780. Plaintiff contends that this is different from "damage" and includes any "loss or injury to person or property." (Opp. at 28.) But even accepting plaintiff's interpretation (which is not supported by any relevant case law), plaintiff has *not* suffered "any damage."

V. PLAINTIFF'S FRAUD AND DECEIT CLAIM DOES NOT MEET THE REQUIREMENTS OF RULE 9(B)

Plaintiff's complaint only contains generalized assertions about purported misrepresentations made by defendants. It does not, as required by Rule 9(b), state "with particularity" the alleged fraud. Indeed, plaintiff does not state the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Walton v. Mead*, No. C 03-4921 CRB, 2004 WL 2415037, at *7 (N.D. Cal. Oct. 28, 2004) (citation and internal quotation marks omitted).

Nor do his claims plead the elements of fraud with particularity, including the elements of reliance and damages. *See, e.g., 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 663 & n.2 (9th Cir. 1999) (requiring plaintiff to plead each element of fraudulent concealment with particularity); *Keenan v. D.H. Blair & Co.*, 838 F. Supp. 82, 87 (S.D.N.Y. 1993) (pleading reliance with particularity "assures that there is a causal link between the misrepresentation or omission and the plaintiff's injury"); *Maynes v. Angeles Mesa Land Co.*, 10 Cal. 2d 587, 589-90 (Cal. 1938) (dismissing fraud claim where "damage[s] resulting from" fraud not properly pleaded).

The complaint fails to allege fraud and deceit with the required specificity to meet the requirements of Rule 9(b) and thus, the Court should dismiss plaintiff's Fraud and Deceit claim.

VI. CAPITAL ONE SERVICES, INC., IS NOT A PROPER DEFENDANT AND SHOULD BE DISMISSED.

Plaintiff improperly named Capital One Services, Inc., as a defendant in this action. As his opposition reveals, his only basis for asserting claims against Capital One Services, Inc., is its alleged reference in the credit card agreement and arbitration provision. He does not allege that Capital One Services, Inc., is a party to the credit card agreement. The Court should dismiss Capital One Services, Inc., from the complaint. If plaintiff obtains any evidence to support his mistaken belief that Capital One Services, Inc., should be sued herein in connection with his grievance concerning the arbitration provision, he can amend the complaint at a later date.

VII. PLAINTIFF HAS NO BASIS FOR DECLARATORY RELIEF.

As shown in defendants' opening brief, because plaintiff's CLRA, UCL and fraud claims fail as a matter of law, his declaratory relief claim must be dismissed as well. Indeed, plaintiff does not have any "actual controversy" with defendants sufficient to state a claim for declaratory relief. Plaintiff did not respond to this argument in his oversized opposition brief. Plaintiff has no basis for seeking declaratory relief and the claim fails as a matter of law.

CONCLUSION

For all of the reasons stated herein and in defendants' opening brief, defendants respectfully request that this Court dismiss plaintiff's complaint in its entirety, without leave to amend.

Dated: February 15, 2008

MORRISON & FOERSTER LLP

By: /s/ James R. McGuire
James R. McGuire

Attorneys for Defendants CAPITAL ONE BANK AND CAPITAL ONE SERVICES, INC.